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IN THE

Supreme Court of the United States

October Term, 1970

No. 1347

FAIRVIEW DEVELOPMENT, INC.,
Appellant,

v.

CITY OF FAIRBANKS,
Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

JURISDICTIONAL STATEMENT

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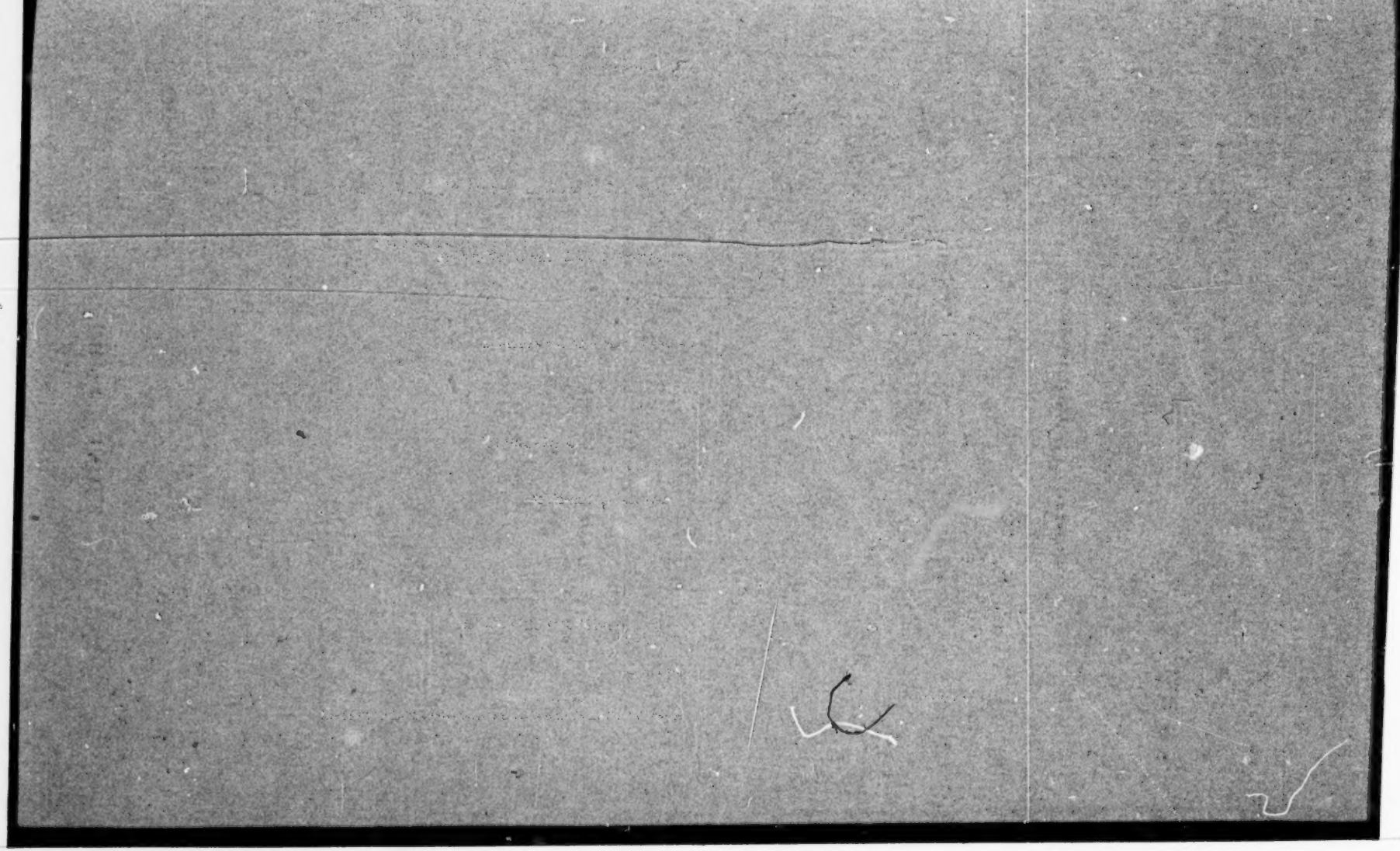

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No. .....

FAIRVIEW DEVELOPMENT, INC.,
Appellant,
v.
CITY OF FAIRBANKS,
Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

JURISDICTIONAL STATEMENT

OPINION BELOW

This appeal is from the judgment of the Supreme Court of Alaska entered on the 23rd day of November, 1970, affirming judgment of the Superior Court for the State of Alaska, Fourth Judicial District at Fairbanks. The mandate is set out in Appendix A. An opinion of the court was entered October 9, 1970 and it was reported under the title FAIRVIEW DEVELOPMENT, INC. v. CITY OF FAIRBANKS in 475 P.2d 35. That opinion is set out in Appendix B herein.

The judgment of the Superior Court which was affirmed is appended as Exhibit C, and the findings of fact and conclusions of law of the Superior Court are appended hereto

as Exhibit D. A petition for rehearing by the Alaska Supreme Court was filed October 16, 1970 and an order denying the petition for rehearing was entered November 16, 1970.

Notice of appeal to this court was filed with the Alaska Supreme Court January 22, 1971.

GROUNDS FOR INVOKING JURISDICTION

This is a civil action challenging the constitutionality of an ordinance of the City of Fairbanks, Alaska on the ground that it violates the Constitution of the United States, Article I, Section 10 by impairing the obligation of contract and Amendment XIV to the United States Constitution by denying to appellant the equal protection of the laws. This appeal is taken pursuant to Title 28, United States Code, Section 1257(2).

The court below applied the questioned ordinance and by state action impaired the obligation of a contract of appellant and denied appellant the equal protection of the laws.

This case involves the validity of Section 7 of Ordinance No. 1068 of the City of Fairbanks which provides:

> Section 7. That leasehold interests and other interests in real property, including improvements, property taxable as real property, which may have been included on the personal property tax rolls, shall be transferred to the real property tax rolls and shall continue to be taxed.

The foregoing statute had the effect of impairing the obligation of a contract whereby the City of Fairbanks leased to appellant certain city owned real property and stipulated:

> It is specifically agreed that during the life of this

> lease as between City and Fairview the buildings placed upon the above described land shall, for the purpose of taxation only, be treated as personalty; and that the full value thereof can and will be carried on the personal property tax rolls of City, and Fairview undertakes and agrees to pay taxes thereon. Should there be any period during the life of this lease when said property shall not be within the taxing limits of City, Fairview shall nevertheless pay to City annually an amount in lieu of taxes equal to that which would have been charged as taxes based upon City's millage rate for general taxation for that year.

The City of Fairbanks, subsequent to the making of the lease, passed Ordinance 1068, approved January 30, 1961, eliminating *ad valorem* taxes on personal property. All other personal property in Fairbanks was thereafter not taxed. Appellant's buildings on the leased land which the City had agreed to treat as personal property were, pursuant to Ordinance 1068, placed on the real property tax rolls and real property taxes were collected from appellants.

Since the buildings which the City had agreed to treat as personal property were taxed and all other personal property in Fairbanks was exempt, appellant was denied the equal protection of the laws, in violation of Amendment XIV of the United States Constitution.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Whether Article I, Section 10 of the Constitution of the United States prohibiting a state from impairing the obligation of contract is violated by a decision of the Alaska Supreme Court and Section 7 of Ordinance 1068 of the City of Fairbanks providing for taxation of plaintiff's prop-

erty in a manner contrary to a lease entered into by plaintiff with the City of Fairbanks.

2. Whether Amendment XIV of the United States Constitution prohibiting states from denying to persons within their jurisdiction equal protection of the laws is violated by the decision of the Supreme Court of Alaska and Section 7, Ordinance No. 1068 of the City of Fairbanks in taxing the personal property of plaintiff where no other personal property is taxed.

STATEMENT OF THE CASE

The City of Fairbanks by Ordinance No. 1068, approved January 30, 1961 (Pl. Ex. 4), exempted all personal property from *ad valorem* taxation. This case involves the effect of that ordinance upon the taxability of improvements placed upon city owned property under a long term lease (Pl. Ex. 2) which lease in its paragraph 8 provides:

> It is specifically agreed that during the life of this lease as between City and Fairview the buildings placed upon the above described land shall, for the purpose of taxation only, be *treated as personalty;* and that the full value thereof can and will be carried on the *personal property tax rolls* of City, and Fairview undertakes and agrees to pay taxes thereon. Should there be any period during the life of this lease when said property shall not be within the taxing limits of City, Fairview shall nevertheless pay to City annually an amount in lieu of taxes equal to that which would have been charged as taxes based upon City's millage rate for general taxation for that year. (Emphasis supplied)

Following the passage of the ordinance eliminating personal property taxation, the city placed the buildings which had been erected on the city property upon the *real* property tax roll for each year beginning in 1961 and undertook to collect taxes upon the value of the buildings and other

physical improvements upon the city owned land for all periods subsequent to 1961 [Findings, p. 5, ¶(1), (R. 105)].

This action is to recover taxes paid under protest upon the value of the buildings and improvements on the city owned property and to determine that they are not taxable to plaintiff on the *real* property tax rolls (R. 1).

The facts in the case were stipulated.

Appellant constructed an apartment complex on the leased premises, financed by a loan insured by the Federal Housing Administration in the sum of $3,080,000. A substantial balance still remains unpaid on the financing indebtedness.

Initially the buildings were placed on the personal property tax rolls.

On the 30th day of January, 1961, the City Council passed and the Mayor approved Ordinance No. 1068 entitled "An Ordinance Eliminating the general *ad valorem* tax on personal property, raising the sales tax to 3%, amending Chapter 5, Taxation, of the Code of Ordinances, Ordinance 980, accordingly and also making minor changes in Chapter 5 providing for a reference and setting an effective date."

After the passage of the ordinance, no personal property taxes were thereafter levied in the City of Fairbanks, but pursuant to Section 7 of that ordinance, appellant's buildings on the leased land were transferred to the real property tax rolls and taxed as real property. Section 7 of that ordinance provides:

> *Section 7.* That leasehold interest and other interests in real property, including improvements, prop-

> erty taxable as real property, which may have been included on the personal property tax rolls, shall be transferred to the real property tax rolls and shall continue to be taxed.

The transfer of the buildings to the real property tax rolls was in direct violation of Section 8 of the lease which had prescribed that the buildings would be carried on the personal property tax rolls and taxed as personal property.

Error was assigned in the Alaska Supreme Court that the trial court had erred in failing to apply Amendment XIV of the Federal Constitution prohibiting the denial of equal protection of the laws, and Article I, Section 10 of the Constitution of the United States prohibiting the impairment of the obligation of contract.

The argument in the briefs is largely concerned with the impairment of the obligation of contract. The brief in citing Section 7 states that the foregoing section had the effect of changing the agreement in the lease with respect to the reservation of the buildings from the freehold, is unconstitutional as impairing the obligation of contract in violation of Section 15 of Article I of the Alaska Constitution and Article I, Section 10 of the Constitution of the United States.

Notwithstanding that the argument was directed very largely to this impairment of the obligation of contract, the Supreme Court of Alaska, in an apparent effort to prevent an appeal to this court on that ground, stated in its opinion:

> The contract clause specification is not argued so we take this point to be abandoned.

We submit that a state court cannot evade constitutional questions by this sort of summary treatment in its opinion.

Section 7 of Ordinance 1068 plainly does repudiate the solemn contract of the city, which is an arm of the State of Alaska, and is clearly in violation of the contract clause of the Federal Constitution.

The Alaska Supreme Court based its decision against appellant upon the ground that taxation on the real property tax rolls was justified by that portion of paragraph 8 of the lease which states:

> Should there by any period during the life of this lease when said property shall not be within the taxing limits of City, Fairview shall nevertheless pay to City annually an amount in lieu of taxes equal to that which would have been charged as taxes based upon City's millage rate for general taxation for that year.

The Alaska Supreme Court decided that that section did not apply to geographical limits but to limitations upon taxation.

This result was arrived at notwithstanding that there was *no limitation* on the power of the city to levy the taxes on the personal property other than the city's own volitional determination not to make these levies. The city did not arrive at this position by any state law or constitution or other limitation, but only by the act of its city council, and there would be nothing to prevent the city council from repealing the ordinance and restoring personal property taxation immediately.

All the city would have to do to tax the property in the manner called for in the contract would be to repeal its own ordinance. There is no constitutional, statutory or other limitation upon the right of the city to tax personal property, and one party to a contract cannot unilaterally change the rights of the other party by its voluntary elec-

tion. The only reason Fairbanks is not now taxing personal property is because the city council by ordinance has elected not to do so.

The validity of the lease is not challenged and was specifically sustained by the 9th Circuit Court of Appeals in *Seltenreich v. Fairbanks,* 13 Alaska 582, 211 F.2d 83, certiorari denied, 348 U.S. 887, 99 L.Ed. 697.

This case presents a perfect example of blatant disregard of the contract clause of the Federal Constitution by the City of Fairbanks, an arm of the State of Alaska.

The contract clause is applicable to municipalities as well as to the state. *Murray v. Charleston,* 96 U.S. 432, 24 L.Ed. 760; *Walsh v. School District of Philadelphia,* 22 A.2d 909, certiorari denied, 315 U.S. 823, 86 L.Ed. 1219.

A municipal ordinance is an exercise of legislative power delegated by the legislature, and falls within a contract clause. *Atlantic Coastline Railroad Co. v. Goldsborough,* 232 U.S. 548, 58 L.Ed. 721; *St. Paul Gas Light Co. v. St. Paul,* 181 U.S. 148, 45 L.Ed. 788.

The city in this case exempted all other personal property, but by the device contained in Section 7 of Article 1068, by transferring the property which by agreement had been classified as personal property, to the real property tax rolls, it taxed this personal property alone, of all personal property in Fairbanks.

This treatment of appellant's personal property different from the personal property of all other persons in Fairbanks is a denial to this appellant of the equal protection of the laws and is in violation of the 14th Amendment of the Federal Constitution. The Alaska Supreme Court again declined to consider the equal protection feature raised in

this appeal and the state action does deprive this appellant of the equal protection of the laws.

We do not believe that citation of authority to establish that the Constitution means what it says is essential to have a state court apply the plain language of the Federal Constitution.

QUESTIONS ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION

The case is important since it involves the question of whether a state, by legislative action may repudiate its contracts. The City of Fairbanks is a branch of the State of Alaska, and the action, including that of the Supreme Court, is State action in which the State has done precisely what the Federal Constitution forbids, namely to impair the obligation of a contract. The intervention of this court is necessary to protect appellant from the flagrant disregard of the safeguards placed in the Federal Constitution against denying equal protection of the laws and impairing the obligation of contract.

This matter should be entertained by this court to give to this appellant the benefit of the guaranties of the Federal Constitution against unimpaired contract and the equal protection of the laws.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER
By LYLE L. IVERSEN
Attorneys for Appellant

APPENDIX A

THE SUPREME COURT OF THE STATE OF ALASKA

FAIRVIEW DEVELOPMENT, INC., *Appellant,* v. CITY OF FAIRBANKS, *Appellee.*	File No. 1118 Mandate

To: Superior Court of the State of Alaska,
Fourth Judicial District at Fairbanks.

Fairview Development, Inc. filed an appeal from a judgment of the Superior Court, Fourth Judicial District at Fairbanks in Civil Action No. 63-12 entitled "FAIRVIEW DEVELOPMENT, INC., a corporation, Plaintiff, vs. CITY OF FAIRBANKS, a municipal corporation, Defendant." The case was heard by this court on May 26, 1970. On October 9, 1970 the court filed its written opinion.

It Is ORDERED:

1. The judgment of the superior court, entered February 19, 1969, is affirmed.

2. Appellee shall recover from appellant costs and attorney's fees as shown below.

WITNESS The Honorable George F. Boney, Chief Justice of the Supreme Court, State of Alaska, this 23rd day of November, 1970.

Costs and Attorney's Fees:

Duplicating appellee's brief	$ 79.00
Attorney's fees	250.00
Total	$329.00

(Mrs.) JOSEPHINE M. MCPHETRES
Clerk, Supreme Court,
State of Alaska

By: BETTY H. BAILEY
Chief Deputy Clerk

APPENDIX B

THE SUPREME COURT OF THE STATE OF ALASKA

FAIRVIEW DEVELOPMENT, INC., *Appellant*, v. CITY OF FAIRBANKS, *Appellee*.	File No. 1118 OPINION [No. 643— October 9, 1970]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Everett W. Hepp, Judge.

Appearances: Walter Sczudlo, Fairbanks, and Lyle L. Iverson of Lycette, Diamond & Sylvester, Seattle, Washington, for Appellant. Grace Berg Schaible of Merdes, Schaible, Staley & DeLisio, Fairbanks, and Ben T. Delahay, City Attorney, Fairbanks, for Appellee.

Before: Boney, Chief Justice, Diamond, Rabinowitz, and Connor, Justices.

RABINOWITZ, Justice.

Appellant Fairview Development, Inc. sued appellee City of Fairbanks to recover taxes paid under protest. After a trial of the court without a jury, the action was dismissed with prejudice. Fairview appeals from the superior court's judgment.

In 1950, Fairview leased a parcel of land of about 12 acres from the city for 75 years at an annual ground rental of $1,800. Paragraph 8 of the lease provides:

> It is specifically agreed that during the life of this lease as between City and Fairview the buildings placed upon the above described land shall, for the purpose of taxation only, be treated as personalty; and that the full value thereof can and will be carried on the personal property tax rolls of City, and Fairview undertakes and agrees to pay taxes thereon. Should

> there be any period during the life of this lease when said property shall not be within the *taxing limits* of City, Fairview shall nevertheless pay to City annually an amount in lieu of taxes equal to that which would have been charged as taxes based upon City's millage rate for general taxation for that year. (emphasis added)

When negotiations began between Fairview and the city, part of the land lay outside the city limits, but by the time the lease at issue was executed, that portion of the land had been annexed. In 1951, Fairview completed construction of a multimillion dollar apartment complex on the land. The city abolished personal property taxes in 1961 by Ordinance 1068, which included these sections:

> *Section 6. Savings Clause.*
>
> That the amendment or repeal of sections of the Code of Ordinances effectuated by the enactment of this ordinance shall not be construed to affect or limit the city in the collection of taxes heretofore levied, or as abating any actions now pending under or by virtue of such sections or as discontinuance, abating, modifying, or altering any penalties or interest accruing or to accrue or accrued tax liability or as affecting the liability of any person, firm or corporation or as waiving any right of the city under any section or provision existing at the time of passage of this ordinance.
>
> *Section 7.* That leasehold interests and other interests in real property, including improvements, property [sic] taxable as real property, which may have been included on the personal property tax rolls, shall be transferred to the real property tax rolls and shall continue to be taxed.

Beginning in 1961, the city each year listed the value of Fairview's buildings on its real property tax roll and assessed taxes which Fairview paid under protest. Fairview sued to recover taxes so paid through 1964. The case seems to have been tried on the theory that the payments by Fair-

view were payments in lieu of taxes under paragraph 8 of the lease rather than real property taxes under Section 7 of Ordinance 1068. Fairview argued that the phrase "taxing limits" in the lease meant the geographic limits of the city, so no payments in lieu of taxes had become due because the land and buildings had remained inside the geographic city limits.

The trial court found that the phrase "taxing limits" was ambiguous and, after hearing testimony on the actual intent of the parties, concluded that the parties had intended the city to obtain tax revenues on the buildings for the entire term of the lease.[1] The superior court construed the phrase "taxing limits" as meaning "any restriction or limitation on the City's taxing power and not merely a geographical limitation."

Fairview specified as error the trial court's construction of the phrase "taxing limits" and its failure to apply in its favor the Equal Protection Clause of the United States Constitution and the Contract Clause of the United States and Alaska Constitutions. The Contract Clause specification is not argued, so we take this point to be abandoned; the single conclusory paragraph without citation of any authority which Fairview devotes to its Equal Protection specification is not adequate to put the issue before the court.[2] The sole issue properly raised in this appeal, then, is whether the trial court erred in its construction of the phrase "taxing limits."

---

1. *See* Port Valdez Co. v. City of Valdez, 437 P.2d 768 (Alaska 1968); Pepsi Cola Bottling Co. v. New Hampshire Ins. Co., 407 P.2d 1009, 1013 (Alaska 1965).

2. Supreme Ct. R. 11(a)(8); Lewis v. State, 469 P.2d 689, 691 (1970).

Study of the record including the trial court's memorandum opinion and order, which furnished the bases for the formal findings of fact and conclusions of law which were subsequently entered, convinces us that the judgment below should be affirmed. More particularly, we hold that the trial court's findings of fact underlying its construction of the lease phrase "taxing limits" were not clearly erroneous. In light of these findings of fact, we further hold that the superior court's construction of the phrase "taxing limits" and its conclusions of law entered in conformity with this construction should be affirmed.

The judgment entered below is affirmed.

APPENDIX C

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

FAIRVIEW DEVELOPMENT, INC., a corporation, *Plaintiff*, v. CITY OF FAIRBANKS, a municipal corporation, Defendant.	No. 63-12 JUDGMENT

THE ABOVE ENTITLED MATTER having regularly come on for trial before the undersigned judge sitting without a jury, on the 14th day of August, 1967, the trial having been interrupted by the Fairbanks flood and having been resumed on the 19th day of February, 1968, and the facts having been stipulated but the court having ordered the taking of testimony for the determination of the intention of the parties in placing the following language in paragraph 8 of the lease:

> "Should there be any period during the life of this lease when said property shall not be within the taxing limits of the city, Fairview shall nevertheless pay to city annually an amount in lieu of taxes equal to that which would have been charged as taxes based upon the city's millage rates for general taxation for that year."

and the court having accepted the stipulated findings of fact and the matter having come on for trial on the issue of the intention of the parties with respect to paragraph 8 of the lease, plaintiff being represented by Walter Sczudlo, and Lyle L. Iversen of Lycette, Diamond & Sylvester, defendant being represented by Ed Merdes and Grace Schaible of Merdes, Schaible, Staley & DeLisio, and the court

having heard the evidence and the arguments of counsel and having made findings of fact and conclusions of law, and plaintiff's counsel having stated that plaintiff will stand upon the issues raised in Count 1 and will waive prosecution of Count 2, and the court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The above entitled action is hereby dismissed with prejudice, with costs to defendant.

DATED at Fairbanks, Alaska, this 19th day of February, 1969.

s/ EVERETT W. HEPP
Superior Court Judge

Presented by:
WALTER SCZUDLO
of

Attorneys for Plaintiff

APPENDIX D

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

FAIRVIEW DEVELOPMENT, INC., a corporation, *Plaintiff,* vs. CITY OF FAIRBANKS, a municipal corporation, *Defendants.*	No. 63-12 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE ABOVE ENTITLED MATTER having regularly come on for trial before the undersigned judge sitting without a jury on the 14th day of August, 1967, and the trial having been interrupted by the Fairbanks flood and having been resumed on the 19th day of February, 1968, plaintiff being represented by Walter Sczudlo, and Lyle L. Iversen of Lycette, Diamond & Sylvester, and defendant being represented by Ed Merdes and Grace Schaible of Merdes, Schaible, Staley & DeLisio, the facts having been stipulated by the parties and the matter having been set down for trial under an order entered in the above entitled action on the third day of June, 1966, the material part of which reads as follows:

> "It is now, therefore, ordered as follows:
>
> 1. That at the trial of this cause the stipulation of facts heretofore filed herein on March 23, 1965 shall be accepted as proof without further testimony with respect to the facts covered thereby and may be admitted as an exhibit, together with all the exhibits attached thereto.
>
> 1. That the case may be tried with respect to Count 1 only and Count 2 shall be tried at a later date only if it is determined that the tax is valid.

3. That the issue to be tried now is the determination of the intention of the parties in placing the following language in paragraph 8 of the lease:

'Should there be any period during the life of this lease when said property shall not be within the taxing limits of the city, Fairview shall nevertheless pay to city annually an amount in lieu of taxes equal to that which would have been charged as taxes based upon the city's millage rates for general taxation for that year.'

4. * * *."

and trial having been had on the issue specified in said order, and the court having heard the evidence and having accepted the stipulation of facts and being fully advised in the premises, hereby makes the following:

FINDINGS OF FACT

I. The stipulated facts are as follows:

(a) Fairview Development, Inc. is a corporation duly organized and existing under the laws of the state of Alaska and has paid its annual corporate tax last due and has filed its annual report for the last calendar year as shown by attached xerox copy of Certificate of Compliance and receipt, respectively, issued by the Commissioner of Commerce, attached, marked respectively Annex 1 and Annex 2.

(b) The city of Fairbanks is the owner of the following real property:

Commencing at corner No. 2 of U.S. Survey No. 438 Fairbanks Townsite; thence, proceeding South 0°01′ West a distance of 219.22 feet to the point of beginning and Corner No. 1 of this description; thence South 89°59′ East 990.00 feet; thence, on a curve to the left of 10.00 feet radius an arc distance of 15.71 feet; thence North; 0°01′ East, 90.00 feet; thence on a curve to the right of 1440 feet radius an arc distance

of 490.00 feet; thence on a curve to the left of 13.10 feet radius an arc distance of 17.08 feet; thence, North 55°12′ West 396.68 feet; thence, on a curve to the left of 10.00 feet radius an arc distance of 15.71 feet; thence, South 34°48′ West 385.92 feet; thence, on a curve to the right of 501.67 feet radius an arc distance of 483.47 feet; thence, North 89°59′ West 305.80 feet; thence South 0°01′ West 287.10 feet; thence, South 89°59′ East, 200.00 feet to Corner No. 1 and point of beginning

(c) In approximately October, 1949, representatives of Fairview Development Company commenced negotiations with the city of Fairbanks for the lease of said property for the purpose of erecting an apartment complex thereon.

(d) At that time, the property was unimproved and a portion of the land was then within the city of Fairbanks and a portion lay without the city. On February 21, 1950, the city annexed that portion of the property which was previously outside the city. This was accomplished pursuant to Ordinance No. 467, a copy of which is attached marked Annex 3.

(e) On January 19, 1950, the Common Council of the city of Fairbanks passed, and the mayor approved, Ordinance No. 469 authorizing the leasing of the property to Fairview Development, Inc. A copy of Ordinance No. 469 is attached hereto marked Annex 4. Ordinance No. 469 was ratified by vote of the qualified electors on February 21, 1950.

(f) On the 13th of April, 1950, a lease was entered into between the city of Fairbanks and Fairview Development, Inc. covering said property. A copy of said lease is attached to plaintiff's original complaint herein.

(g) On the 24th day of July, 1950, a new lease was en-

tered into between the city of Fairbanks and Fairview Development, Inc., a true copy of which is attached to plaintiff's amended complaint.

(h) Construction of the apartment complex was financed by a loan insured by the Federal Housing Administration and made by Institutional Securities Corporation of New York in the sum of $3,080,000.00. By the terms of the loan agreement, repayment is made by Fairview Development, Inc. at the rate of $14,213.94 a month, plus an amount of approximately $9,000 monthly for reserves for taxes, insurance and replacements. A substantial balance still remains unpaid on the financing indebtedness. The loan is secured by a mortgage on the leasehold. The mortgage is serviced by Seattle Trust & Savings Bank of Seattle, Washington, to which payments are made by Fairview Development, Inc. and which pays the taxes on behalf of Fairview Development, Inc. out of reserves.

(i) Construction of the apartment complex was commenced in 1950 and completed in 1951.

(j) Beginning in 1951, the buildings were placed on the tax rolls as personal property and the land was treated as exempt property. For the years 1951 through 1960, taxes were levied by the city and paid by Fairview Development, Inc. as follows:

Lot 1	*Year*	*Amount of Tax*	*Amount Paid*	*Date Paid*	*Recepit No.*
Bldg.	1951	$15,806.00	$15,806.00	10-15-51	6335
Land	1951	Exempt			
		15,806.00	15,806.00	04-04-52	7049
Land	1952	Exempt			
Bldg.	1952	21,700.00	21,700.00	10-15-52	1055
		21,700.00	21,700.00	04-17-53	2033
Land	1953	Exempt			
Bldg.	1953	40,000.00	40,000.00	02-26-54	4161
Land	1954	Exempt			
Bldg.	1954	20,000.00	20,000.00	10-07-54	8355
		20,000.00	20,000.00	03-30-55	10904
Land	1955	Exempt			
Bldg.	1955	19,436.50	19,436.50	10-08-55	12637
		19,436.50	19,436.50	03-24-56	15025
Land	1956	Exempt			
Bldg.	1956	40,816.65	20,408.32	10-11-56	1501
			20,408.33	04-10-57	1501
Land	1957	Exempt			
Bldg.	1957	38,873.00	19,436.50	10-25-57	3343
			19,436.50	04-05-58	3343
Land	1958	Exempt			
Bldg.	1958	38,871.00	19,435.50	10-23-58	1860
			19,435.50	05-08-59	1860
Land	1959	Exempt			
Bldg.	1959	41,647.50	20,823.75	10-06-59	4667
			20,823.75	04-25-60	11231
Land	1960	Exempt			
Bldg.	1960	49,977.00	24,988.50	07-29-60	16603
			24,988.50	11-01-60	22375

(k) On the 30th day of January, 1961, the City Council passed and the mayor approved Ordinance No. 1068 entitled "An Ordinance Eliminating The General Ad Valorem Tax on Personal Property, Raising The Sales Tax to 3%, Amending Chapter 5, Taxation of The Code of Ordinances, Ordinance 980, Accordingly, and Also Making Minor

Changes in Chapter 5 Providing For A Reference and Setting an Effective Date." A copy of said Ordinance is attached hereto marked Annex 5. Ordinance No. 1068 was duly submitted to the qualified electors on March 21, 1961, and the proposition was passed. Thereafter, the excise tax, as called for therein, went into effect and personal property taxes were no longer assessed.

(l) For the year 1961, the city levied an assessment against the land in the sum of $441,550, and against the buildings thereon at $2,776,500, and placed this assessment on the real property tax rolls. Fairview Development, Inc. protested the assessment and filed with the Board of Equalization of the city of Fairbanks its petition for prevention of assessed valuation. A copy of said petition covering 1961 taxes is attached hereto marked Annex 6. The assessor thereafter eliminated the assessment upon the value of the land in the sum of $441,450, and Fairview Development, Inc. paid, under protest, the taxes assessed against the buildings on the real property tax rolls with the words "paid under protest" being endorsed on the tax notice returned with the check and also being endorsed upon the check by which payment was made.

(m) The amount paid for 1961 was $41,647.50, which was paid in two installments, one of $20,823.75 on July 10, 1961, for which receipt No. 26900 was issued, and the other in the sum of $20,823.75 paid on September 27, 1961, receipt No. 31289.

(n) For 1962, the buildings were assessed at $2,776,500 and protest was made to the Assessor under date of April 30, 1962 as shown in Annex 7 attached hereto. Payment of 1962 taxes was made under protest. The amount of 1962 taxes paid was $55,252.35 which were paid in installments

of $27,626.18 paid July 9, 1962, receipt No. 36741, and an installment of $27,626.17 paid September 20, 1962, receipt No. 41001. The words "paid under protest" were endorsed on both the tax statements returned with the checks and upon the checks by which payment was made.

(o) In 1963, the land was assessed at $135,125 and the buildings were assessed at $2,814,375 on the real property tax rolls. Petition for correction of assessed valuation was duly made to the city Assessor as shown by attached Annex 8. Thereafter, the city eliminated the assessment on the land and Fairview Development, Inc. paid under protest taxes in the sum of $56,568.94, which were paid in installments of $28,284.47 paid July 24, 1963, receipt No. 48146, and $28,284.47 paid September 16, 1963, receipt No. 91663. The words "paid under protest" were endorsed on both the tax statements returned with payment and the checks by which payment was made.

(p) For the year 1964, the city assessed the land at $135,075 and the buildings at $2,814,375 and petition for correction of assessed valuation was duly filed, a copy of which is attached hereto marked Annex 9. Thereafter the city eliminated the assessment of $135,075 on the land and Fairview Development, Inc. paid under protest taxes to the city of $17,449.13 in installments of $8,724.56 paid July 29, 1964, receipt No. 2645, and $8,724.57 paid September 16, 1964, receipt No. 4589, and also paid to North Star Borough under protest taxes in the sum of $25,329.38 paid November 12, 1964. The words "paid under protest" were endorsed on both the official tax notice and the check by which payment was made.

(q) Minutes of the Board of Equalization, with respect

to each of the petitions are attached hereto and marked respectively "Annex 10 for 1961, 11 for 1962, 12 for 1963, and 13 for 1964."

II. Findings on issue submitted for trial:

(a) The term "taxing limits" in Paragraph No. 8 of the lease between the plaintiff and defendant has no fixed meaning in ordinary usage and no known legal meaning and is ambiguous.

(b) The passing of City Ordinance No. 1068 was a contingency not foreseen by the parties.

(c) That it was the intention of the parties bargaining for the lease that Fairview would receive a lease to the land for 75 years and the furnishing of utilities including streets, sidewalks, etc. to the leased premises and that the City would receive annual ground rent, the advantage of a housing development and the benefits of a substantial source of revenue for taxes on the improvements over a long period of years.

(d) The inclusion of Paragraph No. 8 of the written lease is an act on the part of the parties expressive of what was being bargained for. The phrase "taxing limits" in light of this then existing intention of the parties to provide the City with a source of revenue is held to refer to any restriction or limitation on the City's taxing power and not merely a geographical limitation.

(e) The lease contract obliges Fairview to pay taxes on the improvements in accordance with the provisions of Paragraph 8.

(f) That any inconsistencies that may exist between these Findings and the Court's Memorandum Opinion and

Order of 26 July 1968 shall be resolved in favor of said opinion.

CONCLUSIONS OF LAW

I. The Court has jurisdiction of the parties and the subject matter of this action.

II. Subparagraph 8 of the lease where it refers to taxing limits of the City of Fairbanks refers to any restriction or limitation on the City's taxing power and not merely a geographical limitation.

III. The contract between the parties obliges plaintiff to pay taxes on the improvements in accordance with the provisions of Paragraph 8.

IV. Count I of plaintiff's amended complaint should be dismissed.

V. The matter should be set down for trial upon the issues of Count II.

DATED this 19th day of February, 1969.

Presented by:

WALTER SCZUDLO
Of Attorneys for Plaintiff

s/ EVERETT W. HEPP
Superior Court Judge

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SUPREME COURT, U. S.

FILED
MAR 11 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 1347

FAIRVIEW DEVELOPMENT, INC.,
Appellant,

v.

CITY OF FAIRBANKS,
Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE
SUPREME COURT OF ALASKA

MOTION TO DISMISS

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CRAFTSMAN & NET PRESS SEATTLE, WASHINGTON

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Appellee.

UPON APPEAL FROM THE JUDGMENT OF THE SUPREME COURT OF ALASKA

MOTION TO DISMISS

Appellee hereby moves that this appeal be dismissed pursuant to Rule 16 of the Rules of the Supreme Court of the United States on the ground that there is no jurisdiction in this court either on appeal or for certiorari.

Appellant alleges that the court below applied Section 7 of Ordinance No. 1068 of the City of Fairbanks (cited on page 2 of the Jurisdictional Statement herein) and by State action impaired obligation of a contract of appellant and denied appellant the equal protection of the laws. These allegations are not supported by the record as shown hereafter.

QUESTION OF IMPAIRMENT OF THE OBLIGATION OF CONTRACT

The Supreme Court of Alaska in its opinion entered herein (see Appendix B, Page A-2 of Jurisdictional Statement) affirmed the judgment entered below on the basis of the following statement (Page A-5, Jurisdictional Statement):

> "Study of the record including the trial court's memorandum opinion and order, which furnished the bases for the formal findings of fact and conclusions of law which were subsequently entered, convinces us that the judgment below should be affirmed. More particularly, we hold that the trial court's findings of fact underlying its construction of the lease phrase 'taxing limits' were not clearly erroneous. In light of these findings of fact, we further hold that the superior court's construction of the phrase 'taxing limits' and its conclusion of law entered in conformity with this construction should be affirmed."

The Judgment of the trial court (Appendix C, Page A-6 of Jurisdictional Statement) was based on the trial court's Findings of Fact and Conclusions of Law (Appendix D, Page A-8 of Jurisdictional Statement) in which the trial court found as follows (Page A-15 of Jurisdictional Statement):

> "(c) That it was the intention of the parties bargaining for the lease that Fairview would receive a lease to the land for 75 years and the furnishing of utilities including streets, sidewalks, etc. to the leased premises and that the City would receive annual ground rent, the advantage of a housing development and the benefits of a substantial source of revenue for taxes on the improvements over a long period of years.
>
> "(d) The inclusion of Paragraph No. 8 of the written lease is an act on the part of the parties expressive of what was being bargained for. The phrase 'taxing

> limits' in light of this then existing intention of the parties to provide the City with a source of revenue is held to refer to any restriction of limitation on the City's taxing power and not merely a geographical limitation.
>
> "(e) The lease contract obliges Fairview to pay taxes on the improvements in accordance with the provisions of Paragraph 8."

Based on these findings of fact, the conclusions of law made by the trial court (Page A-16 of the Jurisdictional Statement) were:

> "II. Subparagraph 8 of the lease where it refers to taxing limits of the City of Fairbanks refers to any restriction or limitation on the City's taxing power and and not merely a geographical limitation.
>
> "III. The contract between the parties obliges plaintiff to pay taxes on the improvements in accordance with the provisions of Paragraph 8."

It is clear that the decisions of the courts below were based on findings of fact interpreting the contract between Appellant and Appellee in order to carry out its intent, thus holding as a fact that the section of the ordinance complained of enforced, rather than impaired, the obligations of the contract. Had the section of the ordinance complained of been omitted and the property of Appellant administratively shifted from the personal property tax roll to the real property tax roll, the same questions would have arisen, and the decisions would have been the same. The existence of the ordinance provision had no bearing on the ruling in this case.

As authority for the proposition that municipal ordinance is an exercise of legislative power falling within a contract clause, Appellant (at Page 8 of the Jurisdictional Statement) cites *St. Paul Gas Light Co. v. St. Paul*, 181

U.S. 148, 45 L.Ed. 788, which case goes on to state at Page 149:

> "When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ulitmately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

The holding of the *St. Paul case, supra*, is stated at Page 151 as follows:

> "As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution— did or could result, it follows that the records involves solely an interpretation of the contract, and, therefore, presents no controversy within the jurisdiciton of this court.
>
> "Dismissed for want of jurisdiction."

As the contract was intrepreted by the trial court, it was the intention of the parties that Appellant should receive a lease to the land for 75 years and furnishing of utilities including streets, sidewalks, etc. to the lease premises, and that Appellee would receive annual ground rent, the advantage of a housing development, and the benefits of a substantial source of revenue for taxes on the

improvements over a long period of years. Appellant has made no allegation that any ordinance or State action has deprived Appellant of the 75-year lease to the land and furnishing of utilities for which Appellant bargained. A decision along the lines sought by Appellant would have in fact impaired the obligations of this contract to the detriment of Appellee.

QUESTION OF EQUAL PROTECTION OF THE LAWS

At no time has Appellant attempted to show legal authority for the proposition that a long term leasehold is not a taxable interest in real property. At no time during the trial of this matter did the Appellant attempt to show either that there were *no* other holders or leasehold interests which had previously been included on the personal property tax roll and that the section of the ordinance complained of applied to Appellant alone, or that there were other holders of leasehold interest whose property was not shifted to the real estate tax roll and therefore became exempt. Rather Appellant, without showing that a long term leasehold interest in real estate is not in fact realty, has claimed that Appellant should be treated just as owners of personal property because the contract provided that its leasehold interest should be included on the personal property tax roll. If in fact such a leasehold interest is realty, then exemption of Appellant's leasehold interest from taxation because of the contract agreement and the repeal of personal property taxes would have in fact violated the constitution by denying equal protection of the laws to all other real property taxpayers.

SUMMATION

The obligations of the contract between Appellant and Appellee have not been impaired, but rather have been enforced. Equal protection of the laws has not been denied Appellant because its leasehold interest is treated in the same manner as other real property. Appellant has shown no basis for jurisdiction of this court either on appeal or for certiorari. Therefore, this appeal should be dismissed.

Respectfully submitted,

BENJAMIN T. DELAHAY, JR.
City Attorney
Attorney for Appellee